

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed
Permanent Rules Governing
the Special Supplemental Nutrition
Program for Women, Infants and
Children (WIC Program), Minnesota
Rules 4617.0002 through 4617.0176.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on March 27, 1997, at 9:00 a.m. in the Chesley Room, 717 Delaware Street, Minneapolis, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Health (Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the Department after initial publication are impermissible substantial changes.

Wendy Willson Legge, Assistant Attorney General, 525 Park Street, St. Paul, Minnesota 55155, appeared on behalf of the Department. The Department's hearing panel consisted of Rick Chiat, WIC Vendor Unit Supervisor; Mary Donohue, State WIC Administrator; and Mary Rogness, WIC Compliance Specialist.

Twelve persons attended the hearing. Eight persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the hearing, to April 16, 1997. Pursuant to Minn. Stat. § 14.15, subd. 1 (1996), five working days were allowed for the filing of responsive comments. At the close of business on April 23, 1997, the rulemaking record closed for all purposes. The Administrative Law Judge received one written comment from interested persons during the comment period. The Department submitted written comment responding to matters discussed at the hearings and making changes in the proposed rules.

The Department must wait at least five working days before the agency takes any final action on the rule(s); during that period, this Report must be made available to all interested persons upon request.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. The Department filed the following documents with the Administrative Law Judge at the hearing:

- a) the Department's request for approval of its Notice Plan (Exhibit 1);
- b) a copy of the proposed rules certified by the Revisor of Statutes (Exhibit 2);
- c) the Statement of Need and Reasonableness (SONAR) (Exhibit 3);
- d) the Notice of Hearing proposed to be issued (Exhibit 4);
- e) the letter from the Administrative Law Judge approving the Department's Notice Plan (Exhibit 5);
- f) the Addendum to the SONAR (Exhibit 7);
- g) a copy of each Notice of Solicitation of Outside Opinion, published at 18 State Register 1446 (Exhibit 32), 19 State Register 191 (Exhibit 33), and 19 State Register 2333 (Exhibit 34);
- h) All materials received in response the published Notice of Hearing (Exhibits 9-31, and 57).
- i) The certification of the Department's mailing list as accurate and correct (Exhibit 35) and the affidavit of mailing the Notice of Solicitation to that list (Exhibit 36);
- j) A copy of the July, 1996 *WIC Vendor Newsletter* (Exhibit 38) and the affidavit of mailing the *Newsletter* (Exhibit 39);
- k) Copies of the letters to the Legislative Coordinating Commission transmitting the SONAR (Exhibit 40) and the Addendum to the SONAR (Exhibit 41);
- l) The Notice of Hearing and Proposed Rules as published at 21 State Register 1015 (Exhibit 41A);

m) A copy of the Notice of Hearing as mailed to persons on the Department's mailing list (Exhibit 42), the certification of the mailing list as accurate and complete (Exhibit 43), and certification of mailing the Notice to persons on the list (Exhibit 44);

n) A copy of the abbreviated notice as mailed to WIC vendors, local agencies, and food manufacturers (Exhibits 45 and 48) and certification of the mailing lists to those groups (Exhibits 46, 47 and 49);

o) Copies of industry newsletters containing stories on the proposed WIC rule changes (Exhibits 50, 51 and 52);

p) A copy of the notice provided to those persons who requested a hearing in this matter (Exhibit 53) and the certification of mailing that notice (Exhibit 54);

q) The January, 1997, *WIC Vendor Newsletter* (Exhibit 55) and the certification of mailing the *Newsletter* (Exhibit 56); and,

r) a letter from the Department to the U.S. Department of Agriculture (USDA) requesting review of the proposed rule changes (Exhibit 59) and the letter from the USDA approving the changes for the purpose of meeting Federal requirements (Exhibit 60).

2. On December 24, 1996, the Department requested approval of an additional notice plan that included direct mailing of a notice to WIC vendors, local agencies, and food manufacturers; and publication in relevant industry newsletters. Exhibit 1. The additional notice plan was approved on December 30, 1996. Exhibit 5.

3. On January 9, 1997, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. Exhibit 44. the Department mailed the Notice of Hearing on that date to the persons and groups identified in its notice plan. Exhibits 46, 47, and 49.

4. On January 27, 1997, a copy of the proposed rules and the Notice of Hearing were published at 21 State Register 1015. Exhibit 41A.

Statutory Authority.

5. In its SONAR and Notice of Hearing, the Department cites Minn. Stat. §§ 144.11 and 145.894(k) as its statutory authority to adopt the proposed rules. Minn. Stat. § 144.11 states:

The commissioner may make such reasonable rules as may be necessary to carry into effect the provisions of section 144.10 and alter, amend, suspend, or repeal any of such rules.

Minn. Stat. § 144.10 requires the Commissioner of Health to participate in ensuring that Federal aid to mothers and children is maximized. Minn. Stat. § 145.894 states:

The commissioner of health shall:

- (a) develop a comprehensive state plan for the delivery of nutritional supplements to pregnant and lactating women, infants, and children;
- (b) contract with existing local public or private nonprofit organizations for the administration of the nutritional supplement program;
- (c) develop and implement a public education program promoting the provisions of sections 145.891 to 145.897, and provide for the delivery of individual and family nutrition education and counseling at project sites. The education programs must include a campaign to promote breast feeding;
- (d) develop in cooperation with other agencies and vendors a uniform state voucher system for the delivery of nutritional supplements;
- (e) authorize local health agencies to issue vouchers bimonthly to some or all eligible individuals served by the agency, provided the agency demonstrates that the federal minimum requirements for providing nutrition education will continue to be met and that the quality of nutrition education and health services provided by the agency will not be adversely impacted;
- (f) investigate and implement a system to reduce the cost of nutritional supplements and maintain ongoing negotiations with nonparticipating manufacturers and suppliers to maximize cost savings;

- (g) develop, analyze, and evaluate the health aspects of the nutritional supplement program and establish nutritional guidelines for the program;
- (h) apply for, administer, and annually expend at least 99 percent of available federal or private funds;
- (i) aggressively market services to eligible individuals by conducting ongoing outreach activities and by coordinating with and providing marketing materials and technical assistance to local human services and community service agencies and nonprofit service providers;
- (j) determine, on July 1 of each year, the number of pregnant women participating in each special supplemental food program for women, infants, and children (W.I.C.) and, in 1986, 1987, and 1988, at the commissioner's discretion, designate a different food program deliverer if the current deliverer fails to increase the participation of pregnant women in the program by at least ten percent over the previous year's participation rate;
- (k) promulgate all rules necessary to carry out the provisions of sections 145.891 to 145.897;
- (l) report to the legislature by November 15 of every year on the expenditures and activities under sections 145.891 to 145.897 of the state and local health agencies for the preceding fiscal year; and
- (m) ensure that any state appropriation to supplement the federal program is spent consistent with federal requirements.

6. The Commissioner is expressly authorized to adopt rules governing the WIC program. The Administrative Law Judge concludes that the Department has the statutory authority to promulgate these rules.

Nature of the Proposed Rules.

7. The WIC program seeks to improve the nutritional intake, and thereby the health, of pregnant women, postpartum women, infants, and children. To accomplish this goal, women and children are assessed for dietary deficiencies. If such deficiencies are found, the person meets the financial eligibility standards, and money remains available in the program, vouchers are issued for the purchase of foods that will eliminate the dietary deficiencies. The vouchers are redeemed with retail vendors for the items listed on the voucher. The cost of the items is written on the voucher by the vendor and the voucher is paid in the same manner as a check written by a customer.

8. The proposed rules add and modify definitions, establish criteria and a process for limiting the number of retail food vendors which may redeem WIC vouchers, create an immediate application process for successors-in-interest to authorized vendors, modify the eligibility requirements for vendors, and add requirements for accepting and processing WIC vouchers. Exceptions to specific rule standards are established, where granting an exception meets a demonstrated need on the part of participants. The proposed rules modify the provisions for vendor agreements and standards for issuance, use, and return of vendor stamps. Standards for imposing sanctions on vendors that violate the WIC program requirements are also included in the proposed rules.

9. The Department is proposing to calculate a maximum allowable price for redemption of the items listed on each voucher and marking that total on the voucher. The proposed rule includes a methodology for calculating the maximum allowable price. Standards for rejecting vouchers presented for payment by a retail food vendor are modified in the proposed rules. The appeal process is modified to limit appeals to matters where a vendor local agency is disqualified from the WIC program. A "grandfather clause" has been added to afford some vendors seeking reauthorization an opportunity to meet the existing rules, rather than the proposed standards.

10. To be eligible for purchase with a WIC voucher, a food item must be approved for the WIC program. The proposed rule establishes standards for approval of various types of food based on nutritional value, sugar content, availability, and participant taste preference. A provision is added to allow approval of food items for which there is a need within a specific ethnic, cultural, or religious group. Standards for revoking approval are also included in the proposed rules.

Cost and Alternative Assessments in SONAR.

11. Minn. Stat. § 14.131 provides that state agencies proposing rules must identify classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the costs that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

12. The Department concluded that there will be no costs to the State or any other agency. SONAR at 103. There is nothing in the rules which requires any State agency or local public body, other than the Department, to spend money. *Id.* at 94. The persons or groups that the Department concludes will be most affected by the rules are retail food vendors. *Id.* at 93. Food manufacturers and program participants are also identified as affected persons. *Id.*

13. Retail food vendors will be affected by the rules in a variety of ways. The Department notes that the rule will authorize fewer vendors to accept WIC vouchers. Therefore, some vendors will be affected by a loss of WIC business. Some of the vendors that are authorized will receive a benefit by an increase in WIC business. The Department considered competitive bidding consistent with other State contracts as an alternative method of authorizing WIC vendors. SONAR, at 97. This alternative was rejected as prejudicial to small businesses, that currently comprise two-thirds of the authorized vendors in the WIC program. *Id.*

14. The proposed rules render home delivery services ineligible for participation as a vendor authorized to accept WIC vouchers. The Department considered the impact of this prohibition on home delivery services against the high cost of monitoring home delivery services for compliance with the rules governing the WIC program. SONAR, at 98. At the hearing, Department staff indicated that the limited amount of home delivery service, the higher cost of home delivery, the lack of consumer choice between authorized foods and problems encountered in the past with some home delivery vendors contributed to the Department's decision to require WIC purchases to be made at a fixed location.

15. The Department considered a number of alternatives in sanctioning vendors for rule violations, from a point system to fines. SONAR, at 97-98. The assigning of points for violations to individual vendors, with revocation when a certain total was reached was rejected as too difficult to administer. *Id.* at 98. Fines were considered, but the Department was advised that specific legislative authorization was required to impose such sanctions. *Id.* The Department removed consideration of violation of statutes regarding the sale of tobacco from the grounds for sanctioning vendors. The Department has met the requirement to consider alternatives to the rules as proposed.

16. The WIC program relies upon Federal funding and is governed by Federal law. While the Department has latitude in the methods used to implement the program, continued participation by the State is conditioned upon meeting the Federal requirements. The Department has indicated that there are only two provisions in the rules that are different from Federal standards. One is in the denial of an opportunity to correct errors on vouchers where the Department has determined that the error is such that there could be no legitimate payment on the voucher. SONAR, at 100. The Midwest Regional Office of the U.S. Department of Agriculture has previously approved rules which limited voucher adjustments.

17. The other discrepancy with Federal regulation is the limitation of vendors to a single outlet in the proposed rules. In the Federal rules, vendor contracts are allowed

to govern multiple outlets. 7 C.F.R. § 246.12(f). The Department has identified the conflicting expiration dates in different regions as a reason to limit the contract to one site. The monitoring of vendors to ensure compliance with WIC program standards is easier with vouchers being accepted by a vendor at just one location. The differences between the proposed rules and Federal regulations do not constitute a defect in the proposed rules

Fiscal Notice.

18. Minn. Stat. § 15.065 prohibits the adoption of any rule or standard by the Departments of Health, Human Services, Economic Security, Corrections or any health related boards which has a fiscal impact in excess of \$100,000 annually without first providing fiscal notes to the Appropriations Committee of the House of Representatives and the Finance Committee of the Senate. The Department maintains that the rule will impose no costs on local public bodies and will not have a fiscal impact in excess of \$100,000. SONAR, at 103. No fiscal note is required in this matter.

Effect on Farming Operations.

19. Minn. Stat. § 14.111 (1996), imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and the additional notice requirement does not apply.

Proposed Rule 4617.0002 - Definitions.

20. A number of terms used in the rules are defined in proposed rule part 4617.0002. Only the terms generating comments or otherwise needing discussion will be individually mentioned. The remaining definitions are found to be needed and reasonable.

21. The existing definition of “clinic area” found in subpart 8 is modified to “clinic town” and further modified to mean the “town or city” where a local agency distributes vouchers or where a participant is certified. Under Minnesota law, all municipalities are now referred to as “cities.” Minn. Stat. § 412.016. The entity known as a “town” exists as a corporation, subordinate to county government. Minn. Stat. § 365. While the use of the term is technically incorrect, there is no detrimental impact of using the term “town” in the subpart. The definition is needed and reasonable as proposed.

Proposed Rule 4617.0059 - Food Vendor Limitation Criteria.

22. The Department has proposed to add a limitation to the number of retail food vendors which may operate in any particular county. Under subpart 1 of proposed rule 4617.0059, counties will be classified as either Tier I, with a maximum number of 120 participants for each authorized vendor, or Tier II, with a maximum of 60 participants for each authorized vendor. Tier I counties are those with a population of 250,000 or more. Exhibit 65, at 2. At present, only Anoka, Dakota, Hennepin, and Ramsey counties meet that definition. All the other counties in Minnesota are Tier II. When calculating the number of allowable vendors, fractions are to be rounded up and in no instance is the number of vendors to be fewer than the number of clinic towns. Upon receiving more recent information on numbers of WIC recipients, the Department modified the ratio from 60 to 1 to 50 to 1 for participants to vendors in Tier II counties. Department Comment, at 4.

23. Subpart 2 sets out the process for choosing between applicants for vendor licenses where the number of applicants exceeds the maximum number of vendors allowed in a county. In making the decision, the Commissioner of Health is required to consider the geographic accessibility of the applicant to participants, the applicant's business history, and the availability of WIC-allowed foods at the applicant's location. The only absolute requirement for approving a food vendor application is that at least one application must be approved in each clinic town.

24. A large number of vendors, all small businesses from Tier II counties, objected to the imposition of limitations on the number of vendors as restricting access to participants in areas where few vendors are now located. Initially, the Department noted that with the current number of participants and vendors, there would be at most a slight reduction in the number of vendors eligible in Tier II counties. SONAR, at 14. With newer information on the numbers of participants, the Department changed the ratio for Tier II counties to 50 to 1 and noted that with the new ratio there would be a reduction of the number of vendors only in eight Tier II counties. Department Comment, at 4, Attachments A and B. The proposed change in ratio allows more vendors in Tier II counties than the rules as originally proposed. The need for reducing costs renders limitations on the number of vendors reasonable. The Tier I counties are those with significant numbers of vendors and a well-established public transportation system. Reducing the number of vendors in Tier I counties is needed and reasonable. The eight Tier II counties where vendor numbers would be reduced currently have very few WIC participants and an easier standard to meet to qualify. The Department also has a procedure to grant additional vendor authorization where participant hardship is demonstrated. The need to limit the number of vendors counties has been demonstrated in the record. The manner in which the Department seeks to limit the number of vendors is reasonable. The new ratio proposed for Tier II counties is less restrictive on vendor applicants in Tier II counties than the standard originally proposed. The new language is not substantially different.

Proposed Rule 4617.0065 - Vendor Application Process.

25. Minn. Rule 4617.0065 sets the requirements that must be followed by vendors seeking authorization to accept WIC-vouchers as payment for food, and the requirements that the Department must follow in determining whether to approve or deny such applications. Subpart 2 identifies the contents required in an application. The information requested goes directly to standards which vendors must meet to remain eligible to accept WIC vouchers. Newly received applications must be delivered to the Department on or before the first business day of the review period for the region in which the vendor is located. Subpart 4 sets up the review periods as four consecutive months beginning with January 1 of even numbered years and progressing to December 31 of odd numbered years. This provides time to review applications and conduct inspections for vendors and applicants in similar geographic areas. The Department adopted the review period approach to reduce the amount of staff time traveling to vendors throughout the State, and conform such travel to "seasonal variations in inclement weather and road conditions." SONAR, at 21. Every vendor is reviewed once every two years under the proposed rule. This standard meets the review requirement imposed by 7 C.F.R. § 246.12. *Id.* Proposed rule 4617.0065 is needed and reasonable.

Proposed Rule 4617.0066 - Change of Ownership, Name, or Business Site.

26. Subpart 1 of proposed rule 4617.0066 requires a vendor to give the Department prior notice of any change to the ownership, name or business site of the licensed premises. Subpart 2 renders the vendor agreement void immediately upon the change. A process for issuance of an immediate vendor license is established in subpart 3. An immediate vendor license is available where the vendor submits an application and documentation of other licenses held by the vendor. So long as the applicant has not changed the business site to a new county, the Commissioner will approve an immediate vendor license if there has been no history of sanctions in the prior two years against the applicant and where average monthly redemption of WIC vouchers is \$150.00 for a Tier I county or \$100.00 for a Tier II county. The monthly average redemption requirement does not apply where the vendor is the only one in the clinic town, the vendor is not a retail food vendor applicant, or the Commissioner determines that there is a hardship in the area around the vendor. The immediate application will be approved if the vendor not advertised for or accepted WIC vouchers without a valid agreement in place, all the vendor eligibility requirements are met, and there has not been a prior immediate vendor agreement for the same location since the most recent regional review in the vendor's area. If the immediate vendor agreement is approved, its expiration date will coincide with the expiration date of the vendor agreement that was voided. Failure to meet the applicable requirements or the provision of false and misleading information to the Commissioner in the application requires the disapproval of the application for an immediate license.

27. The Department has proposed defining "owner" as any person with a 20 percent or greater interest in a vendor, including any business entity that exercises control over the activities of the retail vendor. With that definition of owner, subpart 1 could render a vendor license void under circumstances that are not related to controls on who may properly be licensed. Assuming they held an equal interest, one person in

a five-person enterprise (whether corporation or partnership) could trigger the change of ownership standard, even where the remaining four persons continued the business. In the death of one person, for example, that person's interest could devolve to another or to the person's estate. That change would constitute a change in ownership by the express terms of the rule. Were that successor in interest to divest ownership of its interest in the enterprise would again trigger the change in ownership standard and deny the retail vendor an opportunity to continue accepting WIC vouchers until the review period established under proposed rule 4617.0065, subp. 4. Depending upon the time of the prior review, a vendor could be disqualified for nearly two years based on such changes in ownership.

28. No commentators identified this rule part as a potential problem. The record does not contain any information as to how many vendors could be affected by this application of the change of ownership standard. Therefore, the rule cannot be found defective as unreasonable. The Department may wish to consider adding language to allow for a vendor to receive more than one immediate vendor license where hardship is shown by the vendor. Such language could recognize that where the change of ownership is involuntary and does not affect the ongoing operation of the vendor, the limitation on the number of immediate vendor agreements does not apply. Such language would be needed and reasonable to preclude unduly harsh impacts on vendors and would not constitute substantially different rule language from that which was initially proposed.

Proposed Rule 4617.0067 - Vendor Eligibility Requirements.

29. The standards that must be met by pharmacy vendor applicants and retail food vendor applicants are set out in proposed rule 4617.0067. For the most part, the eligibility requirements are closely akin to existing rules the WIC vendors are obligated to meet for continued eligibility to accept WIC vouchers for payment. Helen DuFault, appearing on behalf of Hampden Park Cooperative, objected to the requirement that the food vendor stock infant formula. In her store, a cooperative food store in Minneapolis, she has a number of WIC customers, but none of them buy infant formula. DuFault suggested some sort of waiver process be added to the rules to allow retail food vendors to avoid having to carry stock that goes unbought by WIC participants. The Department responded that a waiver process would be unduly burdensome on the agency to administer, the standards for allowing such variances are not clear, and there is no additional expense to vendors for formula, since formula past its "sell-by" date can be returned to the wholesaler for a refund. Department Comment, Attachment D. DuFault indicated that she would have to wait approximately eighteen months to accumulate enough outdated formula to return the items for credit. DuFault Letter.

30. The requirement to stock infant formula is designed to meet the need of the typical participant in the WIC program. While breast-feeding is also a common practice, and an excellent source of infant nutrition, there is no requirement that mothers participating in the WIC program use this method of feeding infants. For a vendor to decline to stock infant formula could result in a *de facto* requirement that a participant forego feeding her infant with formula. Retaining the participant's choice to use formula

is necessary to further the goals of the WIC program. The additional burden placed on retail food vendors by requiring that infant formula be stocked is reasonable. The infant formula stocking requirement is needed and reasonable, as proposed.

31. Subpart 4A requires all vendors to be open to the public for a minimum of Monday through Saturday from 10:00 a.m. to 6:00 p.m. This is a change from the existing rule that required the vendor be open Monday through Friday from 10:00 a.m. to 4:30 p.m. The proposed subpart also includes a provision for a variance where the Commissioner determines that different hours are needed due to religious or cultural reasons. The expansion of minimum business hours is intended to meet the needs of participants and allow for adequate monitoring by the Department. SONAR, at 37. The variance provision affords flexibility where needed to reasonably accommodate religious strictures that prohibit conducting business on certain days of the week (or between sundown and sundown on two consecutive days) and cultural standards that would render certain mandated hours useless to meet the needs of participants. Subpart 4A is needed and reasonable as proposed.

32. A significant change from the existing rule is contained in subpart 4B, which proposes that a vendor operate from a fixed and permanent location. Existing vendors who sell WIC-approved foods from a route delivery service will no longer be able to accept WIC vouchers as payment for those foods sold in that manner. To remain eligible as a WIC vendor, these route delivery businesses would need to open a fixed location for retail sales and all WIC transactions would need to be performed at the checkout of that location. The Department asserts that the rule is needed because foods sold by route delivery services are more expensive than foods sold in fixed locations, that there is less variety offered to participants by route vendors, and monitoring compliance by such vendors is unduly burdensome. The Department maintains the rule is reasonable because abuses will be reduced, costs will be reduced, and participants will retain access to WIC vendors.

33. Route vendors and their customers objected to the proposal to bar route vending from eligibility in the WIC program. Rod Johnson, a route vendor for twenty years, maintained that route vending costs were competitive with small grocery stores. Johnson asserted that some participants would have trouble getting to authorized retail vendors. Exhibit 77. Denial of WIC vendor eligibility would hurt business since participants buy other items when using their vouchers. *Id.*

34. The Department introduced its analysis of vendor prices classified by vendor type. SONAR, Attachment 5. The Department's claim that the cost of food is higher from route vendors is accurate. However, the proposed rules establish the maximum allowable cost of WIC-allowed foods. Route vendors would not be allowed to charge more than that maximum. If higher food cost is a problem, the Department should address the problem by reducing the maximum amount allowable for food from whatever source, not eliminating a class of vendors. There has been no need demonstrated to bar route vendors from the program due to the cost of food.

35. The lack of variety of WIC-approved foods available to participants from route vendors has not been demonstrated in the record. Since food vendors sell to regular customers, particular preferences in WIC-allowed foods can be stocked for sale to that customer. The Department's rules are very specific as to the minimum stocking requirements for eligible vendors. The rules do not require some different "variety" standard for fixed locations. No such standard can be used to support rendering route vendors ineligible when that standard is not imposed on vendors in fixed locations.

36. The Department has demonstrated that monitoring route vendors is unusually difficult. By their nature, sales by route vendors are transitory events that occur at the homes of participants. With the transaction occurring in the privacy of the home, casual observation of the transaction is impossible. Since WIC vouchers are redeemed in the same fashion as submitting a check for payment, the potential for abuse is substantial. To conduct monitoring purchases, Department investigators must rent an apartment and occupy the premises for a substantial length of time. By contrast, monitoring purchases at fixed locations consists of going there during the vendors' business hours and making the purchases. The proposed rules emphasize the need for limiting the location of transactions to reduce the opportunity for abuse. For example, proposed rule 4617.0068, subp. 1B(1) requires that vouchers only be accepted for purchase of WIC-allowed foods in the check-out lane of the vendor's location. The difficulty in monitoring vendor conduct is a demonstration of the need for requiring a fixed location for the vendor to conduct WIC transactions.

37. The Department indicated that the USDA has circulated a draft memorandum that would treat route vendors differently under the WIC program in all states. The proposal would replace vouchers with receipts for food items received. The receipt would be signed by the participant and the route vendor would submit the receipts with an invoice for payment on the food delivered. Exhibit 74. The existence of this draft memorandum indicates that the experience with route vendors throughout the entire WIC program is a cause for concern. If the USDA modifies the Federal standard, the Department will be required to authorize eligible route vendors that meet the Federal standard. There is no obligation on the Department to continue authorizing route vendors while the USDA decides on a course of action. The Regional Director of Special Supplemental Nutritional Programs for the USDA has issued a letter approving the proposed changes in the Minnesota WIC program. Exhibit 60. The requirement of a fixed location for conducting WIC transactions is needed and reasonable.

38. Subpart 6 replaces the existing rule disqualifying vendors that had been disqualified from another food and nutrition service program, had received a money penalty rather than disqualification, or were owned by a person who owned another business currently disqualified from the WIC program. The new subpart adds the requirement that the vendor not hold out as eligible to accept WIC vouchers prior to having an executed vendor agreement, clarifies the effect of a civil money penalty on eligibility, and incorporates the "controlling person standard" to prevent avoidance of penalties by persons sanctioned for violations in other stores. In addition, subpart 6 requires that Tier I vendors average \$150.00 per month in WIC redemptions for the year prior to reapplication. For Tier II vendors, the average is \$100.00 per month.

39. A number of vendors objected to the monthly dollar limitations as being an undue restriction on their eligibility as retail vendors. The Department has demonstrated that the administrative burden of enrolling, inspecting, monitoring, and enforcement is substantial. Where a vendor is not redeeming a substantial number of vouchers, there is no need on the part of vendors or participants to see that particular vendor continue as eligible. In cases of hardship, such as the vendor being the only eligible retail vendor in a clinic town, the limitation does not apply. The costs of the program are better spent on improving the nutritional intake of participants than on administration. The requirements for minimum redemption amounts are needed and reasonable, at proposed.

Proposed Rule 4617.0068 - Operating Requirements.

40. Subpart 1 of proposed rule 4617.0068 establishes the requirements for vendors accepting vouchers as payment for the purchase of WIC-approved foods. Item B enumerates all the steps that must be performed for a participant to properly redeem a voucher in exchange for WIC-approved foods. The only significant change from the existing rules is the requirement that the transaction take place only at the check-out lane of the vendor's location. The Department asserts that this additional requirement is needed to facilitate entry of the correct cost of goods purchased on the voucher, the proper voucher acceptance procedures are followed, and that transactions can be more easily monitored by Department staff. SONAR, at 45. The Department anticipates that transactions performed away from the check-out lane are more likely to be done where the transaction is an abuse of the programs rules. *Id.* The purpose of the transaction is to exchange a voucher for WIC-approved foods. The check-out lane of a retail business is the normal and ordinary place for such transactions when the medium of exchange is cash, personal check, or credit card. Requiring the voucher exchange to take place at the check-out counter is reasonable.

Proposed Rule 4617.0069 - Exceptions Based on Participant Hardship.

41. The Department has proposed a mechanism to provide waivers from some of the requirements in the proposed rules where participants are inconvenienced due to factors of location, culture, or religion. In deciding whether to grant a waiver, subpart 1 of proposed rule 4617.0069 requires the Commissioner to consider the number of participants and vendors, their proximity to each other, availability of transportation, and whether a documented cultural or religious need for an additional store exists. Participant hardship can be used as grounds for waiving the time limitations on when applications may be filed, the requirement that the vendor be located in Minnesota, and the limitation on the number of vendors eligible in any one county. Each of the rules that may be waived are requirements that could impede participants from obtaining the benefits of the WIC program. The Department noted its experience with locations near the state border where towns have not been sufficient eligible vendors in the area from within the state. SONAR, at 49. Culture (especially language) and religious dietary laws can present formidable obstacles to participants that could require waivers to overcome. The Department has demonstrated that the proposed waiver provision is needed and reasonable.

Proposed Rule 4617.0086 - Noncompliance with Program Requirements.

42. Under proposed rule 4617.0086, a system classifying violations of program rules is established. The existing system makes no distinction between seriousness of rule violations, except in the length of time a vendor is disqualified from exchanging vouchers for WIC-approved foods. Under the proposed system, Class A violations require disqualification for the maximum period authorized by Federal regulations. A lesser class of violations, Class B, provide for a warning letter on the first violation and a six-month disqualification on the second violation (if the two violations occur within two years of each other). Class C violations require warning letters for the first two violations and a three-month disqualification on the third violation (if within two years of the other two).

43. Class A violations are conduct that violates the standards for proper acceptance of vouchers, discriminating against participants, or willfully obstructing the administration of the WIC program by providing false or misleading information to the program or attempting to bribe program staff. Such violations are commonly characterized as abuse of the program and result in program funds being dissipated without the proper nutritional benefits being obtained by participants. SONAR, at 57-59. The conduct which constitutes a Class A violation results in vendors receiving money from the program without providing food to participants. Such conduct is obviously not permitted and unlikely to be the result of mistake. Class A violations are properly characterized as those most serious and the Department has shown that imposing the maximum allowable disqualification penalty on the first violation to be needed and reasonable.

44. As Class B violations, the Department has grouped conduct such as providing insufficient documentation, limiting staff access to vouchers, offering incentives to participants to redeem vouchers, providing store credit for nonWIC-allowed foods in exchange for a voucher, failing repeatedly to meet minimum stocking requirements, requiring purchase of certain branded products with vouchers, or requiring a participant to make a cash purchase before allowing use of a voucher. The Department characterized these violations as less serious than Class A violations, but still having an effect on participants. SONAR, at 60-62. As such, the Department has struck a balance between the need to sanction vendors to assure correction of noncompliance and recognition that some of these actions may be the result of errors, not willful misconduct of the vendor. The classification and proposed notice and sanctions of Class B violations are needed and reasonable.

45. Class C violations are identified in subpart 5 and include providing different WIC-allowed food items not listed on the voucher, providing lower quality service to WIC participants, and failing to verify the signature of the participant. The sanctions for Class C violations are warning letters for the first two violations and disqualification for three months upon the third violation in any two-year period. Class C violations are the most technical in nature, the least likely to affect participant nutrition, and the least likely to result in diversion of program funds. The classification and proposed sanctions are needed and reasonable.

46. One vendor criticized the Department's approach to sanctioning vendors, since the participants often attempt to avoid the restrictions imposed on purchases using WIC vouchers. The vendor maintained that the Department was being "unfair" in requiring vendors to police participants. Whenever restrictions are placed on vending products, the seller is left to police the purchases made by members of the public (e.g. alcohol, tobacco products, pharmaceuticals). In the case of the WIC program, the vendor is receiving payment, not from the purchaser, but from the State. The WIC program is acting reasonably to require that it pay only for foods that meet the nutritional needs of participants. To remove participants from the program for attempting to violate its standard defeats the purpose of the program, which is to ensure that nutritionally appropriate food is placed in the hands of participants. Vendors are the most appropriate entities to enforce the purchasing requirements, since vendors are making a profit on the transaction. If a vendor is not willing to enforce the purchase requirements, the vendor is not required to participate in the WIC program. The benefits to vendors from participation in the program far outweigh the inconvenience of following the program's requirements.

Proposed Rule 4617.0088 - Noncompliance with Program Requirements.

47. Propose rule 4617.0088 requires the imprinting of the maximum total amount that can be charged for the purchase of the foods listed on the voucher. The maximum price is 120 percent of the average price of the food products. Subpart 1 requires that the Department use a "statistically significant" sample of vendors. A number of commentators criticized the maximum price limitation as being biased regarding small businesses. Sharon Robinson, Ph.D., R.D., WIC Manager for the Kellogg Company, noted that Kellogg has reduced its prices for cereal by an average of 19 percent. The Department indicated that, based on its statewide price survey, the regional costs of the minimum stock of foods ranged from \$207.71 in the northern region to \$198.72 in the southern region. Exhibit 55, at 7.

48. The existing standard for pricing limits the maximum price to the average price of vendors in the same region plus one standard deviation. Minn. Rule 4617.0065, subp. 5. While the term "average" is not defined, the Department appears to have used the term to describe the mean price taken from all vendors who respond to the Department's shelf survey. In such an instance, the price of a WIC approved food will be affected the number of vendors who charge at a particular price and not the number of participants who purchase item at a particular price.

49. The Department stated that "Average vendor prices will be calculated in much the same way they are currently calculated, by collecting shelf price surveys from vendors. Department Comment, at 12. The proposed rule does not require any specific method of calculating the "average price" charged by vendors. What the rule does require is that the Department use "a statistically significant sample of vendors." Under the rule as proposed, the Department would be authorized to use a sample without regard to location or type of vendor. The number of vendors that renders the sample "statistically significant" may not render the sample representative of the range of vendors statewide. The Department has demonstrated that it has the ability to calculate

average costs statewide by vendor type. SONAR, at Attachment 5. The Department has stated “Average vendor prices will be calculated in much the same way as they are currently calculated, by collecting shelf price surveys from vendors.” Department Comment, at 12. The current method appears to combine the individual price at each vendor location and divide by the number of vendors. SONAR, Attachment 11. Using the current method for price calculation has been shown to be needed and reasonable.

50. Since the Department has identified the method it is using to determine the price of food, failing to narrowly specify what constitutes an adequate sample does not constitute a defect in the proposed rules. The Department may wish to modify the rule language to require clearly that its sample must be representative of all eligible vendors statewide. The Department may also wish to more narrowly define the computational method to be used to determine how the price will be calculated. The following language is a suggestion for language that would achieve these ends:

51. The commissioner shall compute an average price for each food product listed on a voucher based on the most recent statewide price information available to the commissioner on prices charged by a statistically significant and representative sample of vendors.

52. The suggested language ensures that all areas of the State and all types of vendors are included in calculating the maximum price that can be charged anywhere in the State. Both the original language and the suggested language are needed and reasonable. The modification, if made by the Department, relies upon the existing practice to more narrowly draw the proposed rule and is not substantially different from the rules as proposed.

53. The Department may also wish to identify a minimum sample and whatever methodology that will be used to calculate the statewide average. The term “average” does not distinguish between mean or median prices and there is no indication as to whether prices are weighted to reflect how many participants are receiving that particular price. An “average” vendor price could be calculated by dividing total spent on a food item by the number of participants purchasing that food item. Since the Department is relying upon its existing method of calculating the average price, the uncertainty in the rule language is not a defect. If the Department seeks to use a different method in the future, standards must be adopted to support the use of that particular method.

54. Hampden Park Coop suggested that the pricing rules were unreasonable since organically grown foods are often more expensive than food grown with other methods of cultivation. The Department responded that the cost of particular foods could be a ground for removing the WIC-approval from that food. The Department is administering a program with limited funds and has demonstrated the need to extend participation to the fullest extent consistent with the program’s funding. Where nutritionally equivalent food can be obtained that does not exceed the maximum cost established by the Department, a rule requiring vendors to limit the purchase to particular foods with the cost limitation is both needed and reasonable.

Proposed Rule 4617.0176 - Approval Process for WIC Foods Other Than Infant Formula.

55. For foods other than infant formula, an approval process is established by proposed rule 4617.0176. The two types of approved food are those foods specifically listed in the minimum food stocking requirements (proposed rule 4617.0067, subpart 3) and those foods allowed under Federal regulations where the Commissioner has determined the existence of a need for those foods. Under subpart 2, the determination of need for a type of food must occur at least once every three years. The factors to determine whether a food should be approved are: 1) meeting the size standards for inclusion as approved foods; 2) meeting the federal nutritional standards for WIC-approved foods; 3) whether the food contains sweeteners; and 4) the comparative price for similar foods. For cereal and juices that are not 100 percent citrus juice, the additional factors of sugar content, product availability at retail vendor locations, and participant preference must be considered.

56. Kellogg's urged that the approval process be conducted more frequently. The commentator cited its reduction of the cost of its products as a reason for conducting approvals on a cycle of less than three years. The Department responded that, should available products change significantly, the process would be conducted prior to the end of the three-year period. The three years in which to conduct the approval process is the maximum time. No minimum time is set in the rule. The Department has shown concern over cost containment and participant satisfaction in the selection of approved foods. The rule is needed and reasonable, as proposed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Health ("Department") gave proper notice of this rulemaking hearing.
2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.
3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).
4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).
5. The additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules

as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where otherwise noted above.

Dated this 22nd day of May, 1997.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape Recorded; No Transcript.